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In The

Supreme Court of the United States

No. 773

EDITH HONIGMAN, individually and on behalf of all Class B Stockholders of the Green Giant Company,

Petitioner,

vs.

GREEN GIANT COMPANY, a Minnesota corporation, J. J. BABB, E. C. BROWN, E. B. COSGROVE, R. C. COSGROVE, W. F. DIETRICH, L. E. FELTON, T. G. HARRISON, C. P. JAFFRAY, M. H. MORRIS, G. C. SCOTT, A. R. UPGREN, L. C. VOLLING, and C. S. VRTIS, Individually and as Directors of the Green Giant Company; MINNESOTA VALLEY CORPORATION, a Minnesota corporation; and FIRST NATIONAL BANK OF MINNEAPOLIS, a National Banking corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
The Opinions Below	1
Statement of the Case	2
Argument	3
Appendix—Minnesota Statutes Annotated	11

AUTHORITIES CITED

Cases:	Page
Manacher v. Reynolds, 165 A.2d (Del.Ch.) 741	9
Pepper v. Litton, 308 U.S. 295, 84 L.Ed. 281, 60 S.Ct. 238	8, 9
Perlman v. Feldmann, 219 F.2d 173 (C.A. 2)	8
Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860	8
Seagrave Corp. v. Mount, 212 F.2d 389 (C.A. 6)	8
Southern Pac. Co. v. Bogert, 250 U.S. 483, 63 L.Ed. 1099, 39 S.Ct. 533	8, 9

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The respondents above named respectfully pray that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in the above entitled case be denied.

THE OPINIONS BELOW

The opinion of the Court of Appeals is reported in 309 F.2d 667, and the opinion of the trial judge is reported in 208 F. Supp. 754.

STATEMENT OF THE CASE

The Green Giant Company was incorporated under Minnesota law in 1903, has continuously carried on its business purposes since that time and on July 15, 1960, had outstanding Class A common voting stock and Class B common nonvoting stock. The individual respondents owned more than a majority of the Class A shares but none of them or the other owners of Class A shares, individually or collectively, owned or controlled anything approaching a majority of the Class B shares (R. 311; Supp. R. pp. 1-6), which were not listed on any stock exchange but were traded over-the-counter.

On July 15, 1960, a plan of recapitalization in the form of charter and by-law amendments was adopted. It was summarized by both courts below as follows:

> "Under this plan, Class A and Class B shares were exchanged for a new class of voting common stock. Each Class B shareholder was to receive one share of the new common stock for each share of the Class B stock. Each Class A shareholder was to receive ten shares of what is termed convertible common stock, each of which would be converted annually into one hundred new voting shares, and in this manner, after the confirmation of the plan and at the end of a ten-year period, the holders of 44 shares of Class A stock would receive 44,000 shares of the new common stock. Under the plan, the present Class B stockholders would have 49.37 per cent of the voting power upon its adoption, and over the ten-year period, the percentage in voting power yearly would increase until by the tenth year it would be 90.70 per cent. The participation of the Class A shareholders in the assets of the company under the plan would be increased from about .01 per cent to 9.3 per cent."

Under Minnesota law (*M.S.A.* 301.37-3, Appendix) approval by the holders of a majority of the Class B shares was required. The plan was approved by the holders of 98.8% of

the Class B shares voted, constituting 92.3% of all outstanding Class B shares (R. 110). The plan, which neither increased nor decreased either the Company's assets or liabilities, is now in effect and all certificates for shares of Class B stock voted against it, except those held by the petitioner, have been exchanged (R. 130, Supp. R. 7). The stock received in exchange for the Class A stock was substantially less in value (R. 235) than the actual value of the Class A stock surrendered (R. pp. 59, 81, 251, 252). The stock received in exchange for the Class B stock had a market value substantially greater than the market value of the Class B stock surrendered (R. 109). The plan has now been in effect for more than two and one-half years and during that time has enabled the Company to effect a merger with the Michigan Mushroom Company.

ARGUMENT

The action below was instituted in federal court because of diversity of citizenship. The controlling law was that of Minnesota where the Green Giant Company was incorporated and domiciled, and where the action was tried. Minnesota law authorized recapitalization by stockholder amendment of articles of incorporation. The prescribed statutory procedure was followed in effecting the recapitalization of the Green Giant Company.

None of the questions which the petitioner lists under the title of "Questions Presented for Review" are, in fact, presented for review. The reasons why they are not are as follows:

> "1. The protection of public stockholders from unconscionable diversion of corporate assets by the controlling management." The plan of recapitalization considered below had no affect on the corporate assets which were

exactly the same after it was adopted as they were before the plan was submitted and hence there was no diversion of corporate assets. Additionally, under Minnesota law the controlling management, that is the holders of the Class A voting stock, were legally incapable of effecting a diversion because any plan required the affirmative vote of a majority of the Class B stock and neither management nor all of the holders of Class A stock held anywhere near a majority of the Class B stock. If the votes attributable to their class B shares were to be disregarded, the stockholders' statutory sanction of the plan would not be affected (R. 110; Supp. R. pp. 1-6). It follows that there was no diversion of any corporate assets and that what was done in the way of recapitalization was accomplished by the holders of the Class B stock and not by "controlling management."

"2. The legality of the sale of control of a publicly held company for the private benefit of the controlling management." The plan here involved made no provision for any "sale of control." There was no "sale" to anyone. The transfer of control was to the holders of the Class B non-voting stock. It was intended that under the plan "benefits" would accrue to Company and all of its stockholders. The intended benefits did in fact accrue to a substantial and demonstrable degree by the time of trial, which commenced five months after the adoption of the plan.

"3. The right of the courts to pass upon the fairness of a recapitalization plan upon complaint of a minority stockholder." Notwithstanding the fact that no state or federal statute expressly empowers courts to review the fairness of charter amendments of the kind here under consideration, both the District Court and the Court of

Appeals held that in the exercise of their equitable jurisdiction they had the power to review the fairness of the plan at the behest of a single minority shareholder. Not only did the courts below so hold, but they also held that the burden of proving fairness was upon those who proposed the plan. It is difficult to conceive of a more complete vindication of the right of the courts to pass upon the fairness of a recapitalization plan upon complaint of a minority stockholder.

"4. The duty of the controlling management of an unlisted company to abide by the requirements of fair disclosure in soliciting proxies from public stockholders." The trial court below assumed that such a duty existed and expressly found that the terms of the plan of recapitalization were fully and fairly disclosed to all stockholders. In making such a finding it may be that the trial judge was not unmindful of the undisputed evidence to the effect that the petitioner's counsel summarily rejected management's offer to provide her any additional information she might desire concerning the plan of recapitalization.

Accordingly, it is submitted that none of the questions which the petitioner says are presented for review are in fact presented. What she really seeks is to use the federal courts as a device to extend retroactively, with the force of law of Minnesota, a doctrine which has never been enacted by any legislative body and which neither this Court nor any other federal court has ever regarded as having any application to the fact situation presented below. Her purpose is to secure a retrial of her case to the end that she and her counsel may be afforded another opportunity to attempt to become vicarious lawmakers.

The petitioner's principal contention in support of her effort to upset the plan of recapitalization was that the plan was so unfair to the Class B stockholders, who had overwhelmingly approved it, that it should, on equitable principles, be set aside at the instance of a single objector. Since the plan was demonstrably financially beneficial to the Green Giant Company and all Class B shareholders, including the petitioner, she was forced to rely on a misapplication of the theory of Mr. A. A. Berle that stock control is a corporate asset, and on this premise attempt to arrive at the conclusion that, in equity, the value that inheres in control stock, and in this case was proven to exist, must be disregarded and treated as though it in fact did not exist.

There are many faults in the petitioner's principal contention. In the first place, Mr. Berle's theory has never found acceptance in Minnesota in any degree. Secondly, his theory could have no application to the fact situation here presented where the holders of the non-voting stock (as distinguished from the "voting" or "control" stock), by virtue of the statutory requirement of their approval, accomplished the transfer of voting control to themselves in return for the surrender by them of a small part of their equity interest. And, finally, the contention is squarely in conflict with the trial court's finding of fairness. Explicit in the finding of fairness is recognition of the fact that stock which carries with it voting control of a successful business corporation may have actual value in excess of its equity interest or book value, and that where such actual value is proven to be substantial, neither the shareholders nor courts of equity are required to disregard it in passing upon a plan of recapitalization.

The two factors that put the instant case beyond the realm of any possible application of the theory contended for by the petitioner are these:

1. *The plan of recapitalization did not provide for a transfer of control to outsiders, but on the contrary provided for its transfer to the non-voting shareholders.*

2. *Under Minnesota law the holders of the Class B shares, voting as a class, had an absolute right of veto over the plan, with or without the concurrence of the directors or the holders of the Class A shares.* These two considerations render completely inapplicable all cases and treatises dealing with equitable intervention in the exercise of the control function of controlling stock for the obvious reason that the plan under consideration below was not, and could not have been, put into effect by an exercise of the control function attending the ownership of the Class A shares. And, similarily, the same considerations render inapplicable all cases and speculations based upon fact situations involving injury or the possibility of injury to corporations arising out of the transfer of control to outsiders. In the present case there was no such injury or possibility of injury.

A subsidiary contention of the petitioner was that the issuance of stock under the plan of recapitalization did not satisfy the Minnesota statutory requirements of consideration. Although the statutes relied upon by the petitioner were of doubtful application to stock arising out of shareholder approved charter amendments, the trial judge considered not only the demands of the statutes but also what he characterized as "the basic principles of fair dealing required by equity." Such a consideration, applied to the evidence of substantial financial benefits to the Company and its stockholders, resulted in a finding to the effect that all stock issued pursuant to the plan was issued for a valuable consideration which was not unfair to the then shareholders of the Company, and that such issuance was not violative of

the Minnesota statutory requirements. These findings were amply justified, if not absolutely required, by the evidence concerning the purposes of, and the results accomplished by, the plan of recapitalization.

Another subsidiary contention of the petitioner was that the manner and method of submitting the plan to the stockholders was fraudulent, incomplete and misleading. The details of how the plan was submitted as well as the trial judge's basis for his determination are set out at length at pages 762-765 of his opinion reported in 208 F. Supp. 754. Here again the evidence at the trial required a finding that the petitioner's allegations, in this regard, were not sustained.

In view of what has been said above it is submitted that the petitioner has not shown any reason, nor does any exist, why this Court should grant review on a writ of certiorari herein.

The decisions of the courts below on the facts, which it was within their province to determine, are not in conflict with any decision of this Court or that of any other federal court. Whatever one may think of the reasoning of the majority in the cited cases of *Seagrave Corp. v. Mount*, 212 F.2d 389 (C.A. 6), and *Perlman v. Feldmann*, 219 F.2d 173 (C.A. 2), the courts in those cases were dealing with fact situations totally unlike the fact situation presented below, and in each instance were attempting to apply the rules of law and principles of equity obtaining in jurisdictions other than Minnesota. See, *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 82 L.Ed 1290, 58 S.Ct. 860. Neither case determined any federal question.

The petitioner's search for a conflict between the decisions below and those of this Court in *Southern Pac. Co. v. Bogert*, 250 U.S. 483, 63 L.Ed. 1099, 39 S.Ct. 533, and in *Pepper v. Litton*, 308 U.S. 295, 84 L.Ed. 281, 60 S.Ct. 238, is equally

futile. In the present case the trial court held that where persons constituting controlling management of a corporation propose a plan of recapitalization affecting voting rights and equity interests, which, under applicable local law, requires for its adoption approval by the holders of the shares which theretofore had no voting rights, voting as a class on the proposal, those who propose the plan must fully and fairly submit it to the stockholders and must, if called upon by a single stockholder, satisfy a court of equity of the fairness of the plan. This holding, affirmed on appeal, is entirely consistent with the decisions of this Court in the *Bogert* case and the *Pepper* case, neither of which dealt with a fact situation at all comparable to that presented below. No decision of this Court or that of any other court holds that in adopting a plan of recapitalization stockholders may not consider actual values before and after recapitalization, or that a court of equity may not consider, together with other evidence, the views of the stockholders as expressed in their voting for the adoption of the plan. Cf. *Manacher v. Reynolds*, 165 A.2d (Del. Ch.) 741. The petitioner would have federal courts change this by the application of legalistic alchemy which would transmute actual values into nothingness and by according to her, as distinguished from the other stockholders whom she regards as uninformed, the right to substitute her views of fairness for the determination of an experienced and distinguished trial judge, fully concurred in by an appellate court.

The changes in the corporate structure of the Green Giant Company of which the petitioner complains have now been in effect for more than two and one-half years; they have proven to be of benefit to the Company and all of its stockholders, including the petitioner; no other stockholder has joined the petitioner in her effort to undo the changes; the stockholder approval of the changes was overwhelming; and the peti-

tioner has wholly failed to show that either court below misapplied any controlling rule of law or principle of equity in the determination of this case.

Respectfully submitted,

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APPENDIX

MINNESOTA STATUTES ANNOTATED

301.37 Amendments of articles of incorporation

Subdivision 1. Extent. A corporation may amend its articles of incorporation in the manner herein provided, so as to include or omit any provision which it would be lawful to include in or omit from original articles at the time the amendment is made, or so as to extend its duration for a further definite time or perpetually.

Subdivision 2. * * *

Subdivision 3. When and how made after allotment of shares. After allotment of any shares:

(1) Amendment of the articles may be made at any meeting of the shareholders, provided notice of proposal to amend, stating the nature of such proposal, shall have been mailed to each shareholder entitled to vote thereon, at least ten days prior to such meeting, or by written consent of such shareholders given as provided by section 301.26, subdivision 11;

(2) Except as hereinafter in this section provided, an amendment may be adopted only if it receives either:

(a) The affirmative vote of the holders of two-thirds of the voting power of all shareholders entitled under the articles to vote, or such larger or smaller vote, not less than a majority, as the articles may require; or

(b) If not otherwise provided by the articles, the affirmative vote of the holders of a majority of the voting power of all shareholders entitled under the articles to vote and does not receive the negative vote of the holders of more than one-fourth of the voting power of all shareholders entitled to vote;

(3) If an amendment would adversely affect the rights of the holders of shares of any class, then, in addition to the vote required by subdivision 3, clause (2), of this section, the holders of each class of shares so affected by the amendment shall be entitled to vote as a class upon such amendment, whether or not by the terms of the articles such class is entitled to vote; and such amendment shall be adopted only

if it receives, as to each class so affected by the amendment, either:

(a) The affirmative vote of the holders of two-thirds of the shares of such class, or such larger or smaller vote thereof, not less than a majority, as the articles may require; or

(b) If not otherwise provided by the articles, the affirmative vote of the holders of a majority of the shares of such class and does not receive the negative vote of the holders of more than one-fourth of the shares of such class; * * *